

**NO. 47773-4**

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DEREK JOHN DOSSANTOS, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable John R. Hickman

No. 13-1-03135-5

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court properly imposed statutorily authorized Special Sex Offender Sentencing Alternative (SSOSA) and community custody conditions which were crime-related and concerned known precursor activities or behaviors?
2. Whether the trial court properly imposed SSOSA and community custody conditions which were explicitly clear and which provided adequate notice of the proscribed behavior?
3. Whether this Court should review the trial court's imposition of the mandatory \$200 criminal filing fee at sentencing where defendant failed to object and preserve the issue below?
4. Whether this Court should make a determination as to whether appellate costs are appropriate if the State is to prevail on appeal before the State seeks enforcement of costs?

B. STATEMENT OF THE CASE.

1. Procedure

On August 8, 2013, the Pierce County Prosecutor's Office charged DEREK JOHN DOSSANTOS, hereinafter "defendant," with one count of child molestation in the first degree (Count I) pursuant to RCW

9A.44.083. CP 1<sup>1</sup>. On August 27, 2014, the Pierce County Prosecutor's Office filed an Amended Information which added one count of indecent liberties by forcible compulsion (Count II) pursuant to RCW 9A.44.100(1)(a). CP 7-8.

The case proceeded to trial before the Honorable John R. Hickman which resulted in a hung jury. CP 176, 177, 178-79; 9/19/14 RP 276-84<sup>2</sup>. The court declared a mistrial on September 19, 2014. 9/19/14 RP 282-84. The case proceeded to trial again before Judge Hickman on March 23, 2015 after which the jury convicted defendant as charged. CP 238, 239; 3/23/15 RP 3; 4/9/15 RP 328-30.

Prior to sentencing, the Department of Corrections (DOC) completed a Pre-Sentence Investigation Report (PSI). CP 373-388. The defendant also completed a Psychosexual Evaluation with a Mr. Daniel DeWaelsche.<sup>3</sup> CP 389-401. Sentencing was held on June 9, 2015. CP 311-326; 6/9/15 RP 363-90. The court granted defendant's request for a Special Sex Offender Sentencing Alternative ("SSOSA") sentence, which both the State and DOC opposed. CP 311-326, 373-388; 6/9/15 RP 365-70, 385-86. The court imposed a number of affirmative and prohibitive

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<sup>1</sup> Clerk's Papers will be referred to as "CP."

<sup>2</sup> The verbatim reports of proceedings will be referred to as "RP" and cited by date of proceeding (e.g., page 276 of the September 19, 2014 verbatim report of proceeding will be referred to as "9/19/14 RP 276").

<sup>3</sup> The actual date of the psychosexual evaluation report was March 6, 2014. CP 389-401.

conditions as part of defendant's SSOSA sentence, including the requirement that defendant follow all of the recommendations made in the psychosexual evaluation report, which the court orally incorporated by reference. CP 311-326, 333-335; 6/9/15 RP 386. The specific conditions of defendant's suspended SSOSA sentence were set forth in Appendixes F, G and H of the Judgment and Sentence. CP 318, 311-326, 333-335. The court also imposed legal financial obligations including the \$200 criminal filing fee. CP 315; 6/9/15 RP 365, 386. Defendant raised no objections to the conditions imposed at sentencing. 6/9/15 RP 386-90. Defendant filed a timely notice of appeal. CP 336-57.

## 2. Facts

On July 8, 2013, Lucy Kemp took her eight-year-old daughter, L.K., to her Tacoma condominium complex's swimming pool for an evening swim. 4/7/15 RP 92-94, 103. They were accompanied by L.K.'s friend, Isabella, and Isabella's mother. 4/6/15 RP 61; 4/7/15 RP 97, 105-06, 109. Also at the pool was defendant, whom L.K. and her mother had encountered at the pool before. 4/6/15 RP 64, 77-78; 4/7/15 RP 98-101, 103, 113. Defendant was 18 years old at the time. 4/7/15 RP 205-06.

L.K. and defendant played in the pool together. 4/6/15 RP 66-67, 78; 4/7/15 RP 113-14. Defendant would pick up L.K. and throw her, and

L.K. would swim back to defendant. 4/7/15 RP 113. L.K. testified that defendant grabbed her and pulled her towards him while playing in the pool. 4/6/15 RP 78-79. At one point, L.K. got out of the “big pool” where they had been playing and went into the “little pool.”<sup>4</sup> 4/6/15 RP 66-67, 79; 4/7/15 RP 113-16. Defendant was in the little pool with L.K. 4/6/15 RP 67, 69, 79-80; 4/7/15 RP 116-17.

In the little pool, defendant grabbed L.K.’s wrist with his hand and pulled L.K.’s arm towards defendant’s front private area. 4/6/15 RP 69-71, 82. Defendant told L.K. to “touch it.” 4/6/15 RP 73. L.K. tried to pull her hand away but was unable. 4/6/15 RP 71-72, 83. L.K. testified that defendant’s front private felt “inappropriate” and felt like a “circle.” 4/6/15 RP 72. L.K.’s mother heard L.K. loudly say, “I have to go to the bathroom.” 4/7/15 RP 116. L.K. was able to exit the little pool and told her mother that she wanted to go home. 4/6/15 RP 72-73, 80, 83. L.K. also said, “He’s creepy.” 4/7/15 RP 116.

L.K. and her mother left the pool area and went to Isabella’s house, where L.K. disclosed what happened in the little pool. 4/6/15 RP 73; 4/7/15 RP 116-17, 121. L.K.’s mother testified that L.K. was “crying hysterically,” and L.K. said that defendant put her hand over defendant’s

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<sup>4</sup> The “little pool” was described as a “kiddie pool.” 4/7/15 RP 96.

private while they were in the small pool. 4/7/15 RP 117, 121. L.K. told her mother it felt like a “roll of quarters.” 4/7/15 RP 121. L.K.’s mother subsequently contacted law enforcement. 4/7/15 RP 122. Police interviewed defendant on August 7, 2013 at Tacoma police headquarters. 4/7/15 RP 204-05; Exhibit 20. During the interview, defendant told police that he “maybe...touched [L.K.] inappropriately on accident.” Exhibit 20 at 23:43-23:50. Defendant also said it was “hazy” in response to law enforcement’s statement that officers were trying to figure out what happened, and defendant went on to discuss his prior drug use. Exhibit 20 at 59:12-1:03:05.

Both L.K. and her mother identified defendant in open court. 4/6/15 RP 62-63; 4/7/15 RP 97-98. Defendant did not testify at trial. 4/8/15 RP 238.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY IMPOSED STATUTORILY AUTHORIZED SSOSA AND COMMUNITY CUSTODY CONDITIONS WHICH WERE CRIME-RELATED AND CONCERNED KNOWN PRECURSOR ACTIVITIES OR BEHAVIORS.

The Sentencing Reform Act of 1981 (SRA) authorizes the trial court to impose “crime-related prohibitions and affirmative conditions” as part of any sentence. RCW 9.94A.505(9); *State v. Johnson*, 180 Wn.

App. 318, 325, 327 P.3d 704 (2014). A community custody condition is beyond the court's authority to impose if it is not authorized by the legislature. *State v. Warnock*, 174 Wn. App. 608, 611, 299 P.3d 1173 (2013). Whether a trial court has statutory authority to impose a community custody condition is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007); *Johnson*, 180 Wn. App. at 325.

Imposing statutorily authorized conditions of community custody is within the discretion of the sentencing court and is reviewed for abuse of discretion. *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008); *Johnson*, 180 Wn. App. at 326. The proper remedy for a condition not authorized by statute is to reverse that portion of the sentence and remand for resentencing of the improper condition. *State v. Sansone*, 127 Wn. App. 630, 643, 111 P.3d 1251 (2005). Community custody conditions generally will be reversed only if their imposition is manifestly unreasonable. *State v. Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). The imposition of an unconstitutional condition is manifestly unreasonable. *Valencia*, 169 Wn.2d at 792; *Bahl*, 164 Wn.2d at 753.

When a court sentences an offender to a term of community custody, the court must sentence that offender to conditions of community custody listed in RCW 9.94A.703(1) and (2). The court must order the offender to comply with conditions imposed by the Department of

Corrections (DOC). RCW 9.94A.703(1)(b); RCW 9.94A.030(17). The court may also order those conditions provided in RCW 9.94A.703(3).

Pursuant to RCW 9.94A.703(3), the trial court may impose as part of any term of community custody conditions that defendant:

- (b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;
- (c) Participate in crime-related treatment or counseling services;
- (d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community; ... or
- (f) Comply with any crime-related prohibitions.

RCW 9.94A.703(3)(b), (c), (d), (f).

“A ‘crime-related prohibition’ is an order prohibiting conduct that directly relates to the circumstances of the crime.” *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008) (internal citation and emphasis omitted). *See also*, RCW 9.94A.030(10). A prohibition of conduct must be directly related to the crime but need not be causally related. *Zimmer*, 146 Wn. App. at 413. A community custody prohibition designed to prevent the offender from further criminal conduct of the type for which the offender was convicted can be crime-related. *See State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Generally, the court will uphold crime-related prohibitions if they are reasonably related to the crime. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). Whether a community custody prohibition is crime-related is reviewed for abuse of

discretion. *State v. Autrey*, 136 Wn. App. 460, 466, 150 P.3d 580 (2006).

Additionally, a trial court which finds an offender eligible for a SSOSA may order an examination to determine whether the offender is amenable to treatment. RCW 9.94A.670(3). The report of that examination shall include:

Recommended crime-related prohibitions and affirmative conditions, which must include, to the extent known, an identification of specific activities or behaviors that are precursors to the offender's offense cycle, including, but not limited to, *activities or behaviors such as viewing or listening to pornography or use of alcohol or controlled substances.*

RCW 9.94A.670(3)(b)(v) (emphasis added). As conditions of the suspended sentence under a SSOSA, the trial court must require the offender to comply with any conditions of community custody imposed under RCW 9.94A.703, and the court itself must impose “[s]pecific prohibitions and affirmative conditions relating to the known precursor activities or behaviors identified in the proposed treatment plan.” RCW 9.94A.670(5)(b), (d).

A sentencing court that imposes a SSOSA on an eligible offender therefore has authority to impose three types of sentencing conditions: (1) the court must impose conditions regarding “known precursor activities or behaviors identified in the proposed treatment plan;” (2) the court must require the offender to comply with community custody conditions

imposed pursuant to RCW 9.94A.703; and (3) the court may impose other specified conditions set forth in RCW 9.94A.670(6), including “[c]rime-related prohibitions.” RCW 9.94A.670(5)(b); RCW 9.94A.670(5)(d); RCW 9.94A.670(6)(a).

- a. The trial court lawfully imposed the conditions prohibiting defendant from perusing or possessing pornography and sexually explicit materials as crime-related conditions that also related to known precursor activities or behaviors.

Appendix G of the Judgment and Sentence prohibits defendant from perusing “pornography,” and Appendix H prohibits defendant from “possessing[ing] or perusing[ing] any sexually explicit materials in any medium.” CP 311-326, 333-335. Defendant claims that the “prohibitions on pornography and sexually explicit materials do not qualify as crime-related prohibitions and therefore must be stricken.” Brief of Appellant at 20. Defendant seems to ignore the psychosexual evaluation performed by Mr. DeWaelche in this case, which the sentencing court considered when it imposed defendant’s requested SSOSA sentence. *See* CP 389-401; 6/9/15 RP 369, 377, 385-86. The sentencing court had the statutory authority to impose the challenged condition(s) pursuant to RCW 9.94A.670(5)(d), RCW 9.94A.670(5)(b) (referencing RCW 9.94A.703), and RCW 9.94A.670(6)(a) as part of defendant’s SSOSA sentence and accompanying period of community custody.

Under the “Sexual History” section of the psychosexual evaluation report, Mr. DeWaelche noted that defendant reported viewing pornographic magazines, X-rated videos/DVDs, and pornographic Internet sites numerous times since the age of 12, and defendant further reported that he masturbated approximately four times per week to pornographic images online.<sup>5</sup> CP 389-401. Mr. DeWaelche recommended that defendant’s treatment should address “[s]exually deviant arousal... [i]dentification of deviant behavior patterns... [and] [d]isruption of deviant behavior patterns.” CP 389-401. Mr. DeWaelche further recommended that as part of his sexual deviancy treatment, defendant should be prohibited from “[p]ossession and perusal of pornography, as defined by his therapist... This includes, but is not limited to, Internet content, magazines, books, and X-rated films or videos.” CP 389-401. Of relevance is the fact that Mr. DeWaelche’s treatment plan specifically listed those mediums that defendant himself admitted to perusing (i.e., Internet content, magazines, books, and X-rated films/videos). CP 389-401.

Here, the sentencing court had the statutory authority to impose the challenged conditions prohibiting defendant from perusing or possessing pornography and sexually explicit materials under RCW 9.94A.670(5)(d).

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<sup>5</sup> Defendant specifically indicated that he viewed pornographic magazines “on approximately 30 occasions since his age of 12,” viewed X-rated videos/DVDs “on approximately 100 occasions since his age of 12,” and viewed pornographic Internet sites “on approximately 200 occasions since his age of 12.” CP 389-401.

Although Mr. DeWaelche's evaluation report did not expressly state that defendant's perusal or possession of pornography/sexually explicit materials was a precursor activity or behavior to defendant's crimes, the report did note defendant's ongoing masturbation to and viewing of pornographic images. CP 389-401. This ongoing pattern of conduct may reasonably be inferred as occurring before, during, and after the time period defendant molested L.K., and therefore it can be inferred that defendant's perusal and possession of pornography/sexually explicit materials relates to the circumstances of his offense. Moreover, the prohibition at issue addresses an admitted activity (defendant's use of pornography) that directly relates to sexual arousal and therefore affects sex offender treatment. *See, e.g.,* RCW 9.94A.670(3)(b)(v). Prohibiting defendant from possessing and perusing pornography and sexually explicit materials is designed to prevent defendant from further sexually related criminal conduct.

The sentencing court also had the statutory authority to impose the challenged conditions under RCW 9.94A.703(3)(f) and RCW 9.94A.670(6)(a) as "crime-related prohibitions." As explained above, Mr. DeWaelche's evaluation supports the conclusion that defendant's perusal of pornography/sexually explicit material was related to his crime. Defendant had viewed pornography in various forms for approximately six years (from the age of 12 until the age of 18) when he committed the crimes of child molestation in the first degree and indecent liberties with

forcible compulsion. CP 389-401. Defendant routinely viewed sexually explicit materials for sexual arousal and committed a sex offense involving a minor. The trial court did not abuse its discretion in imposing community custody conditions that prohibited defendant from perusing or possessing pornography and sexually explicit materials. This Court should affirm the trial court's imposition of the challenged conditions.

- b. The trial court lawfully imposed the condition prohibiting defendant from joining or perusing public social websites, Skyping, and telephoning sexually-oriented 900 numbers as a crime-related prohibition concerning known precursor activities or behaviors that addressed sex offender treatment concerns.

Appendix H of the Judgment and Sentence prohibits defendant from “joining or perusing any public social websites (Facebook, Myspace, Craigslist, etc), Skyping, or telephoning any sexually-oriented 900 numbers.” CP 333-335. Defendant argues that this condition is not crime-related and must therefore be stricken. Brief of Appellant at 22-23. Defendant cites to *State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008), for support. *Id.* Again, defendant appears to ignore the psychosexual evaluation in this case and the sentencing court’s authority under RCW 9.94A.670(5)(d).

In *O’Cain*, the trial court imposed an indeterminate sentence of 280 months to life after a jury found O’Cain guilty of second degree rape.

***O’Cain***, 144 Wn. App. at 774. As part of the sentence, the trial court imposed conditions of community custody, including the condition that O’Cain “not access the Internet without prior approval” of his CCO and treatment provider. *Id.* On appeal, the court held that this particular prohibition was not crime-related, as there was “no evidence that O’Cain accessed the internet before the rape or that internet use contributed in any way to the crime.” *Id.* at 775. The court remanded to the trial court to strike this condition of community custody. *Id.*

In ***O’Cain***, the trial court did not impose a SSOSA sentence. The appellate court therefore did not evaluate the propriety of the community custody condition under RCW 9.94A.670(5)(d). However, the ***O’Cain*** court did note, “Our holding does not preclude control over internet access being imposed as part of the sex offender treatment if recommended after a sexual deviancy evaluation.” ***O’Cain***, 144 Wn. App. at 775.

Here, the trial court imposed a SSOSA sentence. CP 311-326. As part of the suspended SSOSA sentence, the court imposed the conditions set forth in Appendix H. CP 318, 333-335. The court lawfully imposed the challenged condition in Appendix H under RCW 9.94A.670(5)(d) as “[s]pecific prohibitions... relating to the known precursor activities or behaviors identified in the proposed treatment plan,” as well as under RCW 9.94A.703(3)(b). Mr. DeWaelsche’s psychosexual evaluation report recommended that defendant “should be prohibited from unsupervised contact and communication with his victims, other minor

children, and physically or mentally vulnerable individuals” and defendant’s “relations within the community should be carefully monitored. He should not be involved in any relationship...at any time with anyone who has minor-aged [*sic*] living in or expected to live in the home.” CP 389-401.

The condition prohibiting defendant from “joining or perusing any public social websites (Facebook, Myspace, Craigslist, etc), Skyping, or telephoning any sexually-oriented 900 numbers” is a way to monitor compliance with defendant’s sex offender treatment requirements. Prohibiting defendant from joining or perusing public social websites and Skyping will ensure defendant is not contacting his victim or other minor children and is part of the recommendation that defendant’s relations with the community be closely monitored. *See* CP 389-401. Additionally, the prohibition from “telephoning any sexually-oriented 900 numbers” is part of defendant’s sex offender treatment and Mr. DeWaelche’s recommendation that treatment address “sexually deviant arousal” and identification and disruption of “deviant behavior patterns.” CP 389-401. Together these conditions are designed to prevent further sexually related criminal conduct.

During his psychosexual evaluation, defendant admitted to patronizing an adult book store and topless lounges. CP 389-401. Adult book stores and topless lounges are commercial establishments that promote sexual entertainment. Telephoning “sexually-oriented 900

numbers” is another way of frequenting or contacting a business that promotes sexual entertainment. Prohibiting defendant from seeking sexual entertainment by calling 900 numbers addresses defendant’s sexually deviant arousal and disruption of deviant behavior patterns. The prohibition is also crime-related and therefore a lawfully imposed condition under RCW 9.94A.703(3)(f) and RCW 9.94A.670(6)(a), as defendant admitted to patronizing places of sexual entertainment on a number of occasions since of age of 18. CP 389-401. Defendant was still 18 years old at the time he molested L.K. See CP 7-8, 311-326, 389-401; 4/7/15 RP 205-06.

The trial court lawfully imposed the condition prohibiting defendant from “joining or perusing any public social websites (Facebook, Myspace, Craigslist, etc), Skyping, or telephoning any sexually-oriented 900 numbers.” This Court should affirm the challenged condition.

- c. The trial court lawfully imposed the condition requiring defendant to obtain a chemical dependency evaluation, because the condition was crime-related and associated with defendant’s risk of reoffending.

Defendant next challenges the trial court’s imposition of a chemical dependency evaluation as a condition of community custody. Brief of Appellant at 23. See CP 311-326, 333-335. Defendant claims that this condition is not crime-related and therefore the trial court lacked

authority to impose the chemical dependency evaluation requirement at sentencing. Brief of Appellant at 23-25. Defendant's argument fails, because even though the trial court did not explicitly find in the judgment and sentence that defendant had chemical dependency issues, the record supports that defendant's admitted drug use directly related to the circumstances of the crime and his risk of reoffending.

The audio recording of defendant's August 7, 2013 interview with law enforcement was admitted into evidence and published to the jury during trial. CP 371-372; Exhibit 20; 4/7/15 RP 216-217; 4/8/15 RP 223. The focus of the interview was defendant's contact with L.K. in the condominium pool. Exhibit 20. During the interview, defendant said that it was "hazy" in response to law enforcement's statement that they were trying to figure out what happened. Exhibit 20 at 59:12-59:17. Defendant went on to tell police that he had a drug problem with prescription painkillers earlier that year, and he indicated that his drug use made him act differently and be "not himself." Exhibit 20 at 59:30-1:03:05.

During his psychosexual evaluation, defendant disclosed that he drank "about every two weeks, generally to intoxication," smoked marijuana "at the most once a month," and sold prescription drugs "approximately four times from December 2012 to January 2013." CP 389-401. Regarding the prescription drugs, defendant disclosed that he was prescribed Vicodin, "got about 80 pills, then refilled it eight more times," and "sold about 10% of the pills and took the other 90%." *Id.*

Defendant further added that he ““used more than [he] needed to get high.”” *Id.* Defendant’s mother reportedly noticed a change in defendant’s “affect, mood and behavior over the last few years, culminating with an acute episode of ‘bizarre behavior in early January 2013.’” *Id.*

As a result of the disclosures made, Mr. DeWaelche noted in his report,

It is concerning that [defendant] recently began to use OTC cold medicine and excessively used a prescription of Vicodin to help him sleep. This may have precipitated two psychotic episodes that lead [*sic*] to overnight hospitalization and observation. Although he reports he has no issues with alcohol or illicit drug use, this recent history of self-medicating is indicative of possible future drug/alcohol abuse issues. Due to these facts it is imperative that further psychological evaluation should be conducted, as well as a drug/alcohol evaluation.

CP 389-401. Mr. DeWaelche recommended that defendant complete a drug/alcohol assessment as part of his sexual deviancy treatment. CP 389-401.

As part of its pre-sentence investigation (PSI), DOC interviewed defendant, conducted a “risk assessment,” and completed a PSI report. CP 373-388. Based on defendant’s disclosures during the psychosexual evaluation and PSI, DOC concluded:

Factors which require attention to reduce Mr. Dossantos’s risk to re-offend include his sexual deviancy, drug and alcohol dependency, and mental health issues.

Recommended conditions in Appendix H will enable the Department of Corrections (DOC) to effectively monitor and supervise him in the community.

CP 385. DOC also recommended that defendant obtain a chemical dependency evaluation. CP 386-387.

Here, the trial court lawfully imposed the chemical dependency evaluation condition in Appendixes G and H pursuant to RCW 9.94A.703(3)(c),(d) and RCW 9.94A.670(5)(b). *See* CP 311-326, 333-335. Defendant's admitted drug use in the same year he molested L.K., as well as defendant's acknowledgement that his drug problem made him act differently and made recalling the relevant events "hazy," demonstrate that defendant's chemical dependency issues were related to the circumstances of his offense. The chemical dependency evaluation was therefore lawfully imposed as crime-related treatment. Both the psychosexual evaluation and PSI flushed out further details of defendant's drug use and both recommended that defendant obtain a chemical dependency evaluation to address "possible future drug/alcohol abuse issues" and reduce defendant's risk of reoffending. CP 373-388, 389-401. This Court should affirm the trial court's imposition of the community custody condition requiring defendant to obtain a chemical dependency evaluation.

2. THE TRIAL COURT PROPERLY IMPOSED  
SSOSA AND COMMUNITY CUSTODY  
CONDITIONS WHICH WERE EXPLICITLY  
CLEAR AND WHICH PROVIDED ADEQUATE  
NOTICE OF THE PROSCRIBED BEHAVIOR.

Due process under the Fourteenth Amendment of the United States Constitution and article I, section 3 of the Washington Constitution requires that citizens have fair warning of proscribed conduct. *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). A sentencing condition is unconstitutionally vague if it does not define the proscribed conduct with sufficient definiteness that ordinary people can understand what is prohibited, or if it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *Bahl* at 752-53.

On a challenge for unconstitutional vagueness, the challenged sentencing terms are considered in the context in which they are used. *Id.* at 754. However, “a community custody condition ‘is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.’” *State v. Valencia*, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010) (internal citations omitted). Moreover, “‘impossible standards of specificity’ are not required since language always involves some degree of vagueness.” *Bahl*, 164 Wn.2d at 759 (quoting *State v. Halstien*, 122 Wn.2d 109, 118, 857 P.2d 270 (1993)).

A sentencing court has statutory requirements and limitations regarding what conditions may be imposed. See *State v. Miller*, 159 Wn. App. 911, 930-31, 247 P.3d 457 (2011). “[I]llegal or erroneous sentences may be challenged for the first time on appeal.” *Bahl*, 164 Wn.2d at 744 (quoting *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). The Washington Supreme Court has held that issues of vagueness in sentencing potentially fall under such erroneous sentences and warrant review for the first time on appeal. *Bahl*, 164 Wn.2d at 745. Additionally, a preenforcement challenge to community custody conditions is ripe for review “if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.” *State v. Cates*, 183 Wn.2d 531, 534, 354 P.3d 832 (2015) (quoting *Valencia*, 169 Wn.2d at 786) (other internal citations and quotation marks omitted). Ambiguous language in the conditions of community custody that is unconstitutionally vague may be remanded for the sentencing court to provide more specific language. *Bahl*, 164 Wn.2d at 761-62 (prohibition against owning “pornographic materials” as part of condition of community custody was unconstitutionally vague, requiring remand for resentencing).

- a. The conditions prohibiting defendant from going to or frequenting places where children “congregate” and are “likely to be present” with their illustrative list of prohibited places give ordinary people sufficient notice to understand what conduct is proscribed and provide ascertainable standards of guilt to protect against arbitrary enforcement.

The government’s important interest in protecting minors is served by imposing stringent conditions on convicted child molesters. *See State v. McCormick*, 166 Wn.2d 689, 702, 213 P.3d 32 (2009). “[A defendant’s] rights are already diminished significantly [when] he [i]s convicted of a sex crime and, only by the grace of the trial court, allowed to live in the community subject to stringent conditions. Those conditions... serve an important societal purpose in that they are limitations on ... rights that relate to the [offender’s] crimes....” *Id.* at 702-703.

RCW 9.94A.703(3)(b) permits a court, as a condition of community custody, to order an offender to “[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals.” In *State v. Riles*, the sentencing court properly issued an order prohibiting Riles from having contact with any minor-age children after he was convicted for raping a six-year-old boy. *State v. Riles*, 135 Wn.2d 326, 347, 957 P.2d 655 (1998), *abrogated on other grounds by State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010) (clarifying that

the court will not presume community custody conditions are constitutional). Additionally, the sentencing court imposed conditions of community placement ordering Riles to “avoid places where children congregate” and “not frequent places where minors are known to congregate.” *Riles*, 135 Wn.2d at 333-334.

Similar to defendant, Riles claimed on appeal that the court’s prohibitive conditions were unconstitutionally vague and the “no contact” with minor children condition was unconstitutionally overbroad. *Id.* at 336. The Supreme Court held that “[p]rohibiting [Riles] from having contact with minor-age children for the period of his community placement ... is a reasonable restriction imposed upon him for protection of the public—especially children.” *Id.* at 347. The Supreme Court additionally rejected Riles’ vagueness challenge to the “do not frequent places where minors are known to congregate” condition, reasoning that the condition applied only “to places where children commonly assemble or congregate” (as opposed to all public places), and “persons of common intelligence would understand the conditions prohibiting... Riles from going to places where children may commonly be found.” *Id.* at 349, 352.

In the present case, the trial court imposed conditions prohibiting defendant from “go[ing] to or frequent[ing] places where children congregate” and “frequent[ing] establishments where minor children are likely to be present.” CP 311-326, 333-335. Defendant claims these conditions are unconstitutionally vague “because they insufficiently

apprise Dossantos of prohibited conduct and allow for arbitrary enforcement.” Brief of Appellant at 6. Defendant cites *State v. Irwin*, 191 Wn. App. 644, 364 P.3d 830 (2015), in support of his argument that the prohibitive conditions imposed by the trial court are unconstitutionally vague. Brief of Appellant at 7-8. However, *Irwin* is distinguishable from the present matter.

In *Irwin*, the defendant pled guilty to multiple counts of child molestation in the second degree and one count of possession of minors engaged in sexually explicit conduct in the second degree. *Irwin*, 191 Wn. App. at 647-49. At sentencing, the court imposed a community custody condition prohibiting the defendant from “frequent[ing] areas where minor children are known to congregate as defined by the supervising” Community Corrections Officer (CCO). *Id.* at 647, 649. Defense counsel objected to this condition as being unconstitutionally vague and requested that the court provide a list of prohibited places as examples (as opposed to leaving such places to the discretion of the CCO). *Id.* at 649.

In response, the trial court gave examples and told the defendant he should not “frequent areas of high concentration of children, such as swimming pools and schools and things like that.” *Irwin*, 191 Wn. App. at 649. However, the final condition imposed did not include this oral clarification. *Id.* at 654-55. On appeal, the defendant argued that the final condition prohibiting him from going where “children are known to

congregate” was unconstitutionally vague because it was not immediately clear what places were included. *Id.* at 647, 654-55.

The *Irwin* court found that “[w]ithout some clarifying language or an illustrative list of prohibited locations (as suggested by trial counsel), the condition does not give ordinary people sufficient notice to ‘understand what conduct is proscribed.’” *Id.* at 655 (citing *Bahl*, 164 Wn.2d at 753). The court discussed both *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008) and *State v. Sansone*, 127 Wn. App. 630, 111 P.3d 1251 (2005), and noted that both decisions held that community custody conditions that required further definition from CCOs (regarding the definition of “pornography”) were unconstitutionally vague. *Id.* at 654. The *Irwin* court struck the challenged condition as void for vagueness and remanded for resentencing.<sup>6</sup> *Id.* at 655.

In the present case, the trial court provided defendant with clarifying language and a list of prohibited locations. Appendix H of the Judgment and Sentence lists “Fast-food outlets, libraries, theaters, shopping malls, play grounds and parks, etc.” as prohibited locations. CP 333-335. Appendix G lists “school playgrounds, parks, roller skating

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<sup>6</sup> The *Irwin* court briefly discussed *State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998), and noted that both cases involved the same or similar condition (i.e., a prohibition from going where children congregate). *Irwin*, 191 Wn. App. at 353-54. The *Irwin* court highlighted that *Riles* upheld the challenged condition under a standard of review later disapproved of in *State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010). *Irwin*, 191 Wn. App. at 653-54.

rinks, video arcades” as prohibited locations. CP 311-326. The court did not leave the definition of “where children congregate” or “where minor children are likely to be present” to the discretion of defendant’s CCO.<sup>7</sup> See CP 311-326, 333-335.

The language of the challenged conditions and illustrative list of prohibited locations gives ordinary people sufficient notice to understand what conduct is proscribed and provides ascertainable standards of guilt to protect against arbitrary enforcement. Therefore, the challenged conditions are not unconstitutionally vague. This Court should affirm.

Defendant also makes a First Amendment argument, claiming that the challenged conditions implicate the First Amendment and “have the very real effect of precluding Dossantos’s free exercise of religion and assembly.” Brief of Appellant at 10. However, “an offender’s constitutional rights during community placement are subject to SRA-authorized infringements, including crime-related prohibitions.” *State v. McKee*, 141 Wn. App. 22, 37, 167 P.3d 575 (2007) (provision barring pornographic materials was crime-related condition of community custody and therefore not overbroad in violation of defendant’s free speech rights).

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<sup>7</sup> Appendix H provides, “Do not go to or frequent places where children congregate, (I.E. Fast-food outlets, libraries, theaters, shopping malls, play grounds and parks, etc.) unless otherwise approved by the Court.” CP 333-335. The phrase “unless otherwise approved by the Court” does not change the State’s analysis. The sentencing court still provided clarifying language and an illustrative list of prohibited places, and those clarifications and guidelines remain in effect *unless* defendant goes before the court to seek an exemption.

Defendant is not challenging criminal statutes. Defendant does not argue that the challenged conditions are not crime-related or do not reasonably relate to the circumstances of his offense, his risk of reoffending, or the community's safety. *See* RCW 9.94A.703(3). Here, the prohibitions are crime-related conditions of community custody. They are not overbroad, and the sentencing court had the statutory authority to impose them.

- b. The community custody condition prohibiting defendant from possessing or perusing sexually explicit materials also gives ordinary people sufficient notice to understand what conduct is proscribed and provides ascertainable standards of guilt to protect against arbitrary enforcement.

The defendant next challenges the SSOSA condition in Appendix G of the Judgment and Sentence ordering defendant to “not peruse pornography, which shall be defined by the treatment provider,” as well as the community custody condition in Appendix H ordering defendant to “not possess or peruse any sexually explicit materials in any medium. Your sexual deviancy treatment provider with [*sic*] define sexually explicit materials.” Brief of Appellant at 13-14; CP 311-326, 333-335. With regard to the condition prohibiting perusal of “pornography” as defined by defendant’s treatment provider, the State agrees that under ***Bahl*** and ***Sansone*** the condition is unconstitutionally vague. ***State v. Bahl***, 164 Wn.2d 739, 758, 193 P.3d 678 (2008) (condition prohibiting defendant from accessing or possessing “pornographic materials” held

unconstitutionally vague); *State v. Sansone*, 127 Wn. App. 630, 638-639, 111 P.3d 1251 (2005) (community placement condition prohibiting defendant from possessing “pornography” without prior consent of probation officer held unconstitutionally vague). This Court should therefore remand to the sentencing court for entry of a condition that provides the necessary specificity. *Bahl*, 164 Wn.2d at 761-62; *Sansone*, 127 Wn. App. at 643.

Regarding the challenged condition in Appendix H prohibiting possession or perusal of “any sexually explicit materials in any medium,” the Washington Supreme Court’s decision in *Bahl* is instructive. *Bahl*, 164 Wn.2d 739. In *Bahl*, the defendant was convicted of second degree rape and first degree burglary. *Bahl*, 164 Wn.2d at 743. As part of the defendant’s life term of community custody, the court imposed a condition prohibiting the defendant from frequenting “establishments whose primary business pertains to sexually explicit or erotic material.” *Id.* at 743.

On appeal, Bahl argued that the terms “sexually explicit” and “erotic” were unconstitutionally vague. *Id.* at 758. The court rejected the defendant’s argument and held that the references to “sexually explicit” and “erotic” were not unconstitutionally vague. *Id.* at 759-60. The court concluded that the challenged condition was sufficiently clear when all of

the challenged terms, with their dictionary definitions<sup>8</sup> and the statutory definition in RCW 9.68.130(2)<sup>9</sup>, were considered together. *Id.* at 759-60. Bahl was thus restricted “from patronizing adult bookstores, adult dance clubs, and the like.” *Id.*

If the term “sexually explicit material” is not vague in a ban on visiting establishments whose primary purpose pertains to such material (as in *Bahl*), then the same term would not be vague in a ban on possessing or perusing such material. The dictionary definition and the statutory definition of “sexually explicit material” in RCW 9.68.130(2) provide defendant Dossantos with sufficient notice of what conduct is prohibited. Because the phrase “sexually explicit materials” is sufficiently clear, defendant’s challenge for unconstitutional vagueness fails.

The challenged condition’s additional notation that “[y]our sexual deviancy treatment provider with [*sic*] define sexually explicit materials”

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<sup>8</sup> The *Bahl* court examined the dictionary definition of “sexually explicit” as follows:  
The dictionary definition of “explicit” is “characterized by full clear expression: being without vagueness or ambiguity ... UNEQUIVOCAL.” WEBSTER’S [THIRD NEW INTERNATIONAL DICTIONARY 801 (2002)]. Bahl says that adding “sexual” to the term does not make it any clearer, because a “clear expression of sexuality” or “unequivocal sexual” is not illuminating. Bahl’s parsing of the phrase is artificial. Implementing the dictionary definition, the phrase more correctly is “clearly expressed sexual” materials or materials that are unequivocally sexual in nature.

*Bahl*, 164 Wn.2d at 758-59.

<sup>9</sup> RCW 9.68.130(2) provides, “‘Sexually explicit material’ as that term is used in this section means any pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult human genitals: PROVIDED HOWEVER, That works of art or of anthropological significance shall not be deemed to be within the foregoing definition.”

does not change this result. CP 333-335. Although the condition does grant discretion to a third party to define such material, the discretion in this case rests with defendant's sexual deviancy treatment provider, as opposed to his CCO. CP 333-335. The discretion is therefore to be exercised in the course of providing treatment, and such a reasonable grant of therapeutic discretion is not void for vagueness on its face.

3. THIS COURT SHOULD DECLINE TO REVIEW THE TRIAL COURT'S IMPOSITION OF THE MANDATORY \$200 CRIMINAL FILING FEE AT SENTENCING BECAUSE DEFENDANT FAILED TO OBJECT AND PRESERVE THE ISSUE BELOW.

a. The issue was not preserved below.

Defendant argues the trial court impermissibly levied legal financial obligations (LFOs) on him without doing an adequate inquiry regarding whether he had the present and future ability to pay those costs. Brief of Appellant at 25. Defendant did not challenge the imposition of any of his legal financial obligations at the time of his sentencing. *See* 6/9/15 RP 361-390. Defendant's failure to object should preclude this Court from reviewing the issue on appeal, as defendant waived his right to raise any issue regarding his legal financial obligations.

Generally, the appellate court will not consider a matter raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d

125 (2007). An exception exists for claims of error that constitute manifest constitutional error. RAP 2.5(a)(3). If a cursory review of the alleged error suggests a constitutional issue, then defendant bears the burden to show the error was manifest. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Error is “manifest” if defendant shows that he was actually prejudiced by it. If the court reaches the merits of the claimed error it may still be harmless. *Kirkman*, 159 Wn.2d at 927.

In *Blazina*, the Washington State Supreme Court determined the Legislature intended that prior to the trial court imposing discretionary legal financial obligations, there must be an individualized determination of a defendant’s ability to pay. *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The Supreme Court based its reasoning on its reading of RCW 10.01.160(3), which states,

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

*Blazina*, 182 Wn.2d at 837-38. See RCW 10.01.160(3).

Therefore, to comply with *Blazina*, a trial court must engage in an inquiry with a defendant regarding his or her individual financial circumstances and make an individualized determination about not only the present but also the future ability of that defendant to pay the requested

discretionary legal financial obligations before the trial court imposes them. *Blazina*, 182 Wn.2d at 837-38. The Supreme Court also suggested that trial courts look to GR 34 for guidance when evaluating whether a defendant has the means available to pay discretionary legal financial obligations. *Id.* at 838.

Under GR 34, a person who receives assistance under a needs-based, means-tested assistance program is considered indigent for purposes of qualifying for court-appointed counsel. GR 34(3). GR 34 also discusses the federal poverty level, living expenses, and other compelling circumstances as considerations for qualifying for court-appointed counsel. *Id.*

Defendant does not address his burden of proof under RAP 2.5 apart from stating this Court may review the claimed error, and that in light of *Blazina*, the “broken” LFO system, and to promote justice and facilitate deciding the case on its merits, this Court should address the LFO issues defendant is raising. Brief of Appellant at 29. The error was not preserved.

Here, there was no objection to the imposition of the costs and fees, including the criminal filing fee. 6/9/15 RP 365, 373-78, 386-90. Further, defendant has not shown the alleged error regarding the

imposition of a discretionary LFO is of manifest constitutional magnitude that can be raised for the first time on appeal.

This Court should exercise its discretion to not entertain defendant's unpreserved argument that the trial court did not make a proper inquiry regarding his ability to pay his legal financial obligations and should affirm the trial court's imposition of the legal financial obligations.

b. The \$200 filing fee is mandatory.

The State maintains, as argued above, that defendant has not preserved any issue in regards to legal financial obligations, as there was no objection to any of the legal financial obligations when the trial court imposed them. Additionally, contrary to defendant's assertion, the criminal filing fee is mandatory. This Court should continue to adhere to its holding in *State v. Lundy*, 176 Wn. App. 96, 308 P.3d 755 (2013), as defendant has not shown that *Lundy* is incorrect and harmful.

This Court reviews the purpose and meaning of statutes de novo. *State v. Munoz-Rivera*, 190 Wn. App. 870, 884, 361 P.3d 182 (2015). The statute in regards to the criminal filing fee is clear and unambiguous. RCW 36.18.020 states,

(2) Clerks of superior courts shall collect the following fees for their official services:

...

(h) Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars.

The courts will not employ judicial interpretation if a statute is unambiguous. *State v. Steen*, 155 Wn. App. 243, 248, 228 P.3d 1285 (2010). “A statute is ambiguous when the language is susceptible to more than one interpretation.” *Steen*, 155 Wn. App. at 248. When the reviewing court is interpreting a statute, its “goal is to ascertain and give effect to the intent and purpose of the legislature in creating the statute.” *State v. Stratton*, 130 Wn. App. 760, 764, 124 P.3d 660 (2005) (citation and internal quotations omitted). The court looks to the plain language in the statute, the context of the statute, and the entire statutory scheme to determine the legislative intent. *Steen*, 155 Wn. App. at 248; *Stratton*, 130 Wn. App. at 764 (citations omitted). If the statute fails to provide a definition for a term, then the courts look to the standard dictionary definition of the word. *Stratton*, 130 Wn. App. at 764. If the court finds that a statute is ambiguous, then “the rule of lenity requires that we

interpret it in favor of the defendant absent legislative intent to the contrary.” *Id.* at 765.

Here, the plain language of the statute is clear: the Clerk **shall** collect upon a conviction or plea of guilty the criminal filing fee, which is set in the amount of 200 dollars, as the defendant is liable for the fee. RCW 36.18.020(2)(h). Shall is mandatory, not discretionary. This Court held the criminal filing fee to be mandatory. *Lundy*, 176 Wn. App. at 102. Since *Lundy*, Division Three has also stated the criminal filing fee is mandatory. See *State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016); *State v. Clark*, 191 Wn. App. 369, 374, 362 P.3d 309 (2015). The criminal filing fee is mandatory and it was properly imposed, regardless of defendant’s ability to pay.

Defendant argues that this Court wrongly decided in *Lundy* that the criminal filing fee is a mandatory legal financial obligation, and therefore, the holding is incorrect and harmful. Brief of Appellant at 26-27. Defendant claims that pursuant to the doctrine of stare decises, this Court should overrule its holding in *Lundy* and find the criminal filing fee is actually a discretionary legal financial obligation. *Id.*

The doctrine of stare decisis precludes the alteration of precedent without a clear showing that the established rule is harmful and incorrect. *In re Stranger Creek*, 77 Wn.2d 649, 653, 466 P.3d 508 (1970). The

policy behind stare decisis is to promote stability in court-made law.

*Stranger Creek*, 77 Wn.2d at 653. It does not preclude this Court from consideration of arguments to the contrary, however, as it does not require this Court to continue to uphold a law in perpetuity that is incorrect and harmful. *Id.* The rule of law is a fluid thing and must change when reason requires it to do so. *Id.*

Defendant has not made the requisite showing that *Lundy*, or *Stoddard* and *Clark*, are wrongfully decided or that the finding the criminal filing fee is mandatory is incorrect and harmful. Defendant argues “shall be liable” does not mean the fee is mandatory given that it can mean a “future possible or probable happening that may not occur.” Brief of Appellant at 28. This is an absurd interpretation of the plain language of the statute. Liable, in this context, means that defendant is “responsible or answerable in law; legally obligated” to pay; or subject to the \$200 fine. BLACK’S LAW DICTIONARY 1055 (10<sup>TH</sup> ed. 2014). The statute mandating the Clerk to collect the criminal filing fee, for which defendant is now liable, is not logical if the imposition of the fee is not mandatory. The Clerk cannot collect the fee if the court does not impose it.

There is nothing harmful or incorrect about this Court’s decision that the criminal filing fee is mandatory, and this Court should continue to

follow *Lundy*. Therefore, the trial court's imposition of the criminal filing fee, regardless of whether it made the requisite inquiry into defendant's ability to pay the obligation, was proper because the fee is mandatory.

4. APPELLATE COSTS MAY BE APPROPRIATE  
IN THIS CASE IF THE COURT AFFIRMS THE  
JUDGMENT OF THE TRIAL COURT AND  
SHOULD BE ADDRESSED IF THE STATE  
WERE TO PREVAIL AND WERE TO SEEK  
ENFORCEMENT OF COSTS.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997). The award of appellate costs to a prevailing party is within the discretion of the appellate court. RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000).

In *Nolan*, as in most other cases discussing the award of appellate costs, the defendant began review of the issue by filing an objection to the State's cost bill. *Id.* at 622. As suggested by the Supreme Court in *Blank*, this is an appropriate manner in which to raise the issue. *Blank*, 131 Wn.2d at 244. The procedure invented by Division I in *State v. Sinclair*, 192 Wn. App. 380, 389-390, 367 P. 3d 612 (2016), prematurely raises an issue that is not before the Court. If the defendant does not prevail, and if the State files a cost bill, then the defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill. If appellate costs are imposed, the Legislature has provided a remedy in the same

statute that authorizes the imposition of costs. RCW 10.73.160(4) provides:

A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time petition the court that sentenced the defendant or juvenile offender for remission of the payment of costs or of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the sentencing court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

Defendant argues that because the trial court found him indigent, this Court should presume him indigent and deny any request by the State for appellate costs. Brief of Appellant at 30-31. However, through the language and provisions of RCW 10.73.160, the Legislature has demonstrated its intent that indigent defendants contribute to the cost of their appeal. This is not a new policy.

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976, the Legislature enacted RCW 10.01.160, which permits the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. RCW 10.01.160(2). In *State v. Barklind*, 87 Wn.2d 814, 557 P.2d 314 (1976), the Supreme Court found that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate or even “chill” the right to counsel. *Id.* at 818. In 1995, the Legislature enacted RCW 10.73.160,

which specifically authorizes the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In **Blank**, the Supreme Court held this statute constitutional, affirming this Court's holding in **State v. Blank**, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996). **Blank**, 131 Wn.2d at 239.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, contribute to the costs of their cases. Both statutes have been amended somewhat since originally enacted, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to alter the statutes.

In **State v. Blazina**, 182 Wn.2d 827, 344 P.3d 680 (2015), the Supreme Court interpreted the meaning of RCW 10.01.160(3). As **Blazina** instructed, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. However, **Blazina** does not apply to appellate costs. As **Sinclair** points out, the Legislature did not include the "individual financial circumstances" provision in RCW 10.73.160. **Sinclair**, 192 Wn. App. at 389. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." See RCW 10.73.160(4).

The Legislature's intent that indigent defendants contribute to the costs of representation is also demonstrated in RCW 10.73.160(4), above,

which permits a defendant to petition for remission of part or all of the appellate costs ordered. In *Blank*, the Supreme Court found that this relief provision prevented RCW 10.73.160 from being unconstitutional. *Blank*, 131 Wn.2d at 242.

Not only does the Legislature intend indigent defendants to contribute to the costs of their litigation, but the Legislature has also decided that defendants should pay interest on the debt. RCW 10.82.090(1) provides that such legal debts shall bear interest at the rate applicable to civil judgments, which is found in RCW 4.56.110. This can be as much as 12%. *Id.* RCW 10.82.090(2) establishes a means for defendants to obtain some relief from the interest, much as the cost remission procedure in RCW 10.73.160(4). But, the limits included in the statutory scheme show that the Legislature intends that even judgments on defendants serving prison sentences accrue interest:

(2) The court may, on motion by the offender, following the offender's release from total confinement, reduce or waive the interest on legal financial obligations levied as a result of a criminal conviction...

RCW 10.82.090(2). The rest of the “relief” is equally limited and demonstrates the Legislature’s intent and presumption that the debts be paid:

(a) The court shall waive all interest on the portions of the legal financial obligations that are not restitution that accrued during the term of total confinement for the conviction giving rise to the financial obligations, *provided*

*the offender shows that the interest creates a hardship for the offender or his or her immediate family;*

(b) The court may reduce interest on the restitution portion of the legal financial obligations only if the principal has been paid in full;

(c) The court may otherwise reduce or waive the interest on the portions of the legal financial obligations that are not restitution *if the offender shows that he or she has personally made a good faith effort to pay and that the interest accrual is causing a significant hardship. For purposes of this section, “good faith effort” means that the offender has either (i) paid the principal amount in full; or (ii) made at least fifteen monthly payments within an eighteen-month period, excluding any payments mandatorily deducted by the department of corrections;*

(d) For purposes of (a) through (c) of this subsection, the court may reduce or waive interest on legal financial obligations *only as an incentive for the offender to meet his or her legal financial obligations.* The court may grant the motion, establish a payment schedule, and retain jurisdiction over the offender for purposes of reviewing and revising the reduction or waiver of interest.

RCW 10.82.090(2) (emphasis added). This is not some legislative relic of the past. It was enacted in 1989, after RCW 9.94A (the Sentencing Reform Act), and most recently amended in 2015.

The unfortunate fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes “recoupment of fees for court-appointed counsel.” These defendants would therefore have been found indigent by the court. If the Court decided on a policy to excuse every indigent defendant from

payment of costs, such a policy would, in effect, nullify RCW 10.73.160(3).

Parties and the courts can criticize this legislation, its purpose and result, and that the debts accumulated by indigent defendants under RCW 10.73.160(3) (and 10.01.160) and the interest that accrues under RCW 10.82.090 and RCW 4.56.110 are onerous. The parties may even be in agreement in their criticism. In *Blazina*, the Supreme Court was likewise critical of these statutes and their result. See *Blazina*, 182 Wn.2d at 835-836. Yet, the Court did not find the statutes illegal or unconstitutional.

The question for this Court is not whether the legislative intent or result of these laws is wise or even fair. The question is: Are these laws legal or constitutional? Those questions were settled in the affirmative by the Supreme Court in *Blank* and by what the Court did not do in *Blazina*. It is for the Legislature to change the statute(s) if it so desires.

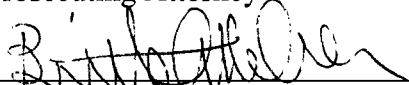
The State concedes that the trial court below entered an Order of Indigency. CP 366-369. In this case, however, the State has yet to “substantially prevail.” It has also not submitted a cost bill. This Court should wait until the cost issue is ripe before exploring the issue legally and substantively. In this instance, if a cost bill is submitted, the court may find that defendant has the ability to pay the cost of his appeal. Any ruling regarding such costs at this time would be merely speculative regarding defendant’s future ability to pay for appellate costs at the time that a cost bill is submitted, if one even is submitted.

D. CONCLUSION.

The State respectfully requests this Court affirm the conditions of defendant's sentence but remand to the sentencing court with an order to strike the term "pornography" from Appendix G of the judgment and sentence and enter a condition that provides the necessary specificity in accordance with the arguments above.

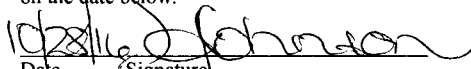
DATED: October 28, 2016

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
BRITTA HALVERSON  
Deputy Prosecuting Attorney  
WSB # 44108

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~US~~ <sup>email</sup> or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

  
Date      Signature

# PIERCE COUNTY PROSECUTOR

**October 28, 2016 - 2:41 PM**

## Transmittal Letter

Document Uploaded: 4-477734-Respondent's Brief.pdf

Case Name: State v. Derek Dossantos

Court of Appeals Case Number: 47773-4

**Is this a Personal Restraint Petition?** Yes ☐ No

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Cost Bill

Objection to Cost Bill

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Letter

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